Supreme Court, U.S.
FILED

011480 APR - 5 2002

OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

HIGHLANDS INSURANCE COMPANY,

Petitioner,

v.

CLERK OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

On Petition for Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

Samuel M. Silver, Esq.
511 Milltown Road, Building 1
North Brunswick, New Jersey 08902
732-937-8332
Counsel for Petitioner

Laura C. Tharney, Esq.
555 Route 18 South, PMB 219
East Brunswick, New Jersey 08816
732-448-9300
Of Counsel

40pp

QUESTION PRESENTED FOR REVIEW

Rule 1:13-3(e) of the Rules Governing the Courts of New Jersey precludes licensed insurance producers and limited insurance representatives from conducting business in the State under certain circumstances. The questions presented in this case are:

1. Whether the Petitioner and its agents and representatives are entitled to due process of law before they are precluded from conducting business in New Jersey.
2. Whether *Rule* 1:13-3(e) and the Supplemental Order referred to as Directive #7-00, as written or interpreted by the Clerk of the Superior Court of the State of New Jersey or the New Jersey courts, deny due process to this Petitioner and others similarly situated in violation of the Due Process Clause of the Fourteenth Amendment.
3. Whether *Rule* 1:13-3(e) and Directive #7-00 violate the right of the Petitioner and its agents and representatives to equal protection under the law in contravention of the Fourteenth Amendment.
4. Whether *Rule* 1:13-3(e) and Directive #7-00 violate the principal of separation of powers.

PARTIES TO THE PROCEEDING

The Petitioner, Highlands Insurance Company, by and through its General Agent, Capital Bonding Corporation, was the surety involved in numerous separate proceedings below and was the party that initiated this case. The Clerk of the Superior Court of the State of New Jersey is the Respondent in this action, but was not named in the matter below, which was captioned "*In re Preclusion of Highlands Insurance Company*".

The individual criminal defendants for whom bail was initially posted have not been named in this Petition since they did not participate below. Those individuals were, however, named in one of the emergent applications to the court whose judgment is sought to be reviewed as follows: Sharif Wilson, Shawn Sheffield, Marcus Denver, Anthony Butler, and Stephen Kpeyue.

RULE 29 DISCLOSURE

There is no parent corporation or publicly held company that owns ten percent or more of the stock of Highlands Insurance Company or of Capital Bonding Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDING ii
RULE 29 DISCLOSURE ii
TABLE OF CONTENTS iii
TABLE OF CITED AUTHORITIES iv
TABLE OF APPENDICES vi
PETITION FOR RELIEF 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
HOW THE FEDERAL QUESTION WAS PRESENTED 6
REASONS FOR GRANTING THE WRIT 6
A. Due Process of Law is Required Before Preclusion 10
B. Preclusion as Currently Implemented Denies Due Process 12
C. Preclusion as Currently Implemented Violates the Separation of Powers 16
D. Preclusion as Currently Implemented Violates the Petitioner's Right to Equal Protection Under the Law. 18
E. Preclusion as Currently Implemented Denies the Petitioner the Benefit of the Equitable Relief Specifically Afforded by the Court Rules, the Applicable Statute and the Case Law. 22
F. This Decision is Both Important and Recurring for Individuals and Entities Other than this Petitioner 25
CONCLUSION 27

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Attorney General of New York v. Soto-Lopez, 476 *U.S.* 898, 909-910 (1986) 10
Bankers Life and Cas. Co. v. Crenshaw, 486 *U.S.* 71, 83 (1988)..... 22
Bell v. Burson, 402 *U.S.* 535 (1971)..... 10
Boddie v. Connecticut, 401 *U.S.* 371, 374-375 (1971) 12
Capital Bonding v. New Jersey Supreme Court, 127 *F. Supp.2d* 582, 584 (D.N.J. 2001)..... 25
Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 *U.S.* 602, 617-618 (1993) 16
County of Sacramento v. Lewis, 523 *U.S.* 833, 845-846 (1998) 13
Dunn *v. Blumstein*, 405 *U.S.* 330, 343 (1972) .. 10
Ex parte Commonwealth of Virginia, 100 *U.S.* 339, 347 (1879)..... 19
Federal Deposit Ins. Corp. v. Mallen, 486 *U.S.* 230, 240 (1988)..... 11
Federal Deposit Ins. Corp. v. Mallen, 486 *U.S.* 230, 243 (1988)..... 13
Fuentes v. Shevin, 407 *U.S.* 67, 80 (1972) *reh'g den.* 409 *U.S.* 902..... 12
Gagnon v. Scarpelli, 411 *U.S.* 778 (1973)..... 10
Gilbert v. Homar, 520 *U.S.* 924, 931-932 (1997) 13
Goldberg v. Kelly, 397 *U.S.* 254 (1970) 10
Goss v. Lopez, 419 *U.S.* 565 (1975)..... 10
I.N.S. v. Chadha, 462 U.S. 919, 944 (1983)..... 9
Lassiter v. Department of Social Services of Durham County, N. C., 452 *U.S.* 18, 24 (1981) *reh'g den.* 453 *U.S.* 927 12

Mathews v. Eldridge, 424 *U.S.* 319, 333 (1976) 11
Miller v. French, 530 *U.S.* 327, 341-342 (2000) 17
Miranda v. Arizona, 384 *U.S.* 436, 491 (1966) ... 9
Nordlinger v. Hahn, 505 *U.S.* 1, 10 (1992) 20
Richards v. Jefferson County, Ala., 517 *U.S.* 793, 799-800 (1996) 16
Richardson v. Perales, 402 *U.S.* 389 (1971) 10
Romer v. Evans, 517 *U.S.* 620, 633 (1996) 19
Rule 1:13-3(e) 7
Santosky v. Kramer, 455 *U.S.* 745, 758 (1982) 10
Sniadach v. Family Finance Corp., 395 *U.S.* 337 (1969) 11
Stanley v. Illinois, 405 *U.S.* 645, 656 (1972) 15
U.S. Term Limits, Inc. v. Thornton, 514 *U.S.* 779, 829 (1995) 9
Vacco v. Quill, 521 *U.S.* 793, 799 (1997) 19
Zinermon v. Burch, 494 U.S. 113, 127 (1990) .. 11

STATE CASES

Petrosino v. Public Service Coordinated Transport, 61 *A.2d* 746, 751 (N.J. Super. Ct. App. Div. 1948) 8
State v. Prickett, 572 *A.2d* 1166, 1169 (N.J. Super. Ct. App. Div. 1990) 8
State v. Ruotolo, 247 *A.2d* 1, 4 (N.J. 1968) 8

STATE STATUTES

N.J. Stat. Ann § 17:22A-17 (West 1987) 17
N.J. Stat. Ann § 2B:3-1 (West 1991) 8

OTHER AUTHORITIES

New Jersey State Constitution, Art. 3, Paragraph 1 17
Rule 3:26-6(b) 22
Rule 3:26-7 22

TABLE OF APPENDICES

	Page
APPENDIX A: Order on Emergent Application of the Superior Court of New Jersey, Appellate Division, dated and filed July 16, 2001	1a
APPENDIX B: Order on Emergent Application of the Superior Court of New Jersey, Appellate Division, dated and filed July 19, 2001	3a
APPENDIX C: Order on Motion of the Superior Court of New Jersey, Appellate Division, dated and filed September 7, 2001	5a
APPENDIX D: Order of the Supreme Court of New Jersey dated January 8, 2001 and filed January 10, 2001	6a

In The Supreme Court of the United States

HIGHLANDS INSURANCE COMPANY,

Petitioner,

v.

CLERK OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

On Petition for Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division

---

PETITION FOR RELIEF

The Petitioner, Highlands Insurance Company, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of the State of New Jersey, Appellate Division.

OPINIONS BELOW

The initial determination of the New Jersey Superior Court, Appellate Division, dated July 16, 2001 (App., *infra*, 1a), was issued in the form of a written order. A subsequent written order was entered in this matter by the New Jersey Superior Court, Appellate Division on July 19, 2001 (App., *infra*, 3a). The Appellate Division then denied the Petitioner's Motion for

Reconsideration by written order dated September 7, 2001 (App. *infra*, 5a). Thereafter, the New Jersey Supreme Court denied the Petition for Certification, by Order dated January 8, 2002 (App., *infra*, 6a), which Order is unreported.

STATEMENT OF JURISDICTION

The final Order of the New Jersey Superior Court, Appellate Division, was entered on September 7, 2001. The New Jersey Supreme Court denied a timely Petition for Certification, on January 8, 2002.

The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person[1] of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

[1] "It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metropolitan Life Ins. Co. v. Ward*, 470 *U.S.* 869, 881 n. 9

Articles I, II, and III of the United States Constitution enumerate and separate the powers of the three branches of government.

STATEMENT OF THE CASE

Highlands Insurance Company, the Petitioner ("Petitioner"), is a corporate surety authorized to underwrite bail bonds in the State of New Jersey.

On June 21, 2001, the Petitioner was advised by way of letter from the Clerk of the Superior Court of the State of New Jersey ("Clerk") that 70 judgments in the total amount of $556,690 had been entered against it in bail bond forfeiture matters. The Petitioner was advised that if payment did not occur by July 9, 2001, its licensed and registered agents and representatives would be removed from the bail bond registry. Such removal would preclude all of those individuals and entities from serving as corporate surety bond agents for the Petitioner throughout the State of New Jersey until all judgments were satisfied. None of them would be able to write bail for the Petitioner in the interim.

On July 9, 2001, the Petitioner advised the Clerk that certain judgments had been entered erroneously, others were the subjects of Superior Court appeals and still others were the subject of motions for exoneration or remission. The record detailing the history and the status of each individual case in this matter consisted of approximately 750 pages. The next day, the Petitioner was advised that if payment of the judgments were not made, the Petitioner's

agents and representatives would, in fact, be removed from the bond registry. It was later determined, however, that a more detailed analysis of the matters could be sent to the Clerk.

On July 11, 2001, the Petitioner sent the Clerk a letter explaining the status of each matter and advised that it would satisfy the 37 uncontested judgments totaling $138,627 by tendering certified checks to the Clerk. The Petitioner also notified the Clerk that there were eight matters pending appellate review, four matters in which judgments had been erroneously entered and docketed twice (applications to vacate those judgments had already been filed), and one case in which the bond had already been discharged by the Court. In the 16 remaining cases, the Petitioner had previously filed motions to vacate the judgments, which motions were still pending below.

In response to this information, the Clerk revised the number of outstanding cases from 70 to 56 and amended the demand from $556,0690 to $339,290. The Clerk further advised that he would not await the collateral determinations of the trial courts in the 16 cases in dispute, and demanded that the funds claimed due be paid no later than noon on July 13, 2001.

The Petitioner filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division ("Appellate Division"), and applied to have the matter heard as emergent. That initial filing was denied without prejudice to any application the Petitioner might file in each of the underlying matters in which it had or might

file a motion to vacate the judgment (App. *infra*, 1a). As a result of the denial, and in response to the language contained in the Court's Order of July 13, 2001, the Petitioner re-filed Notices of Appeal and supporting documentation for each of five underlying cases and filed motions in each one of the trial courts to permit the posting of supersedeas bonds.

After approximately a week, the emergent applications were denied and, to the surprise of the Petitioner, all of the underlying appeals were dismissed as well (App., *infra*, 3a). In dismissing the appeals on its own motion, the Court suggested that review by the Appellate Division was premature at that time, claiming that review of the Clerk's determination required consideration of the particular facts in each of the underlying disputed default matters (App. *infra*, 4a).

Despite the apparent determination by the Appellate Division that these matters were not ripe, an immediate telephone call to the New Jersey Supreme Court to make an emergent application resulted in an instruction to Counsel for the Petitioner that the matters were moot, since the Petitioner had already been precluded from conducting business.

A motion for reconsideration was timely filed with Appellate Division from the denial of the relief sought and the dismissal of the underlying appeals. On September 11, 2001, the Appellate Division denied the Petitioner's motion for reconsideration of its earlier determination and the dismissal of the five appeals (App. *infra*, 5a).

A Petition for Certification to the New Jersey Supreme Court followed, which Petition was denied by Order dated January 8, 2002 (App., *infra*, 6a).

HOW THE FEDERAL QUESTION WAS PRESENTED

The Constitutional issues in this case were extensively briefed for initial presentation to the New Jersey Superior Court, Appellate Division, in July of 2001. At the time of that initial briefing, the Petitioner raised not only the threshold basis for review by the State court, but the due process, separation of powers, equal protection, equitable, and judicial economy arguments in support of its position.

These issues were subsequently raised on petition for certification to the New Jersey Supreme Court. The New Jersey Supreme Court did not address any these issues, as it declined to grant certification.

REASONS FOR GRANTING THE WRIT

Rule 1:13 of the Rules Governing the Courts of New Jersey is part of the rules of general application and it sets forth certain miscellaneous rules as to procedure. *Rule* 1:13-3, which addresses the approval and filing of surety bonds, and judgments against a principal and surety, was modified effective September 2000 to add sections 1:13-3(d) and 1:13-3(e). *Rule* 1:13-3(d) provides that, in the State of New Jersey, surety bonds for the purposes of bail may be accepted only from licensed insurance

producers and limited insurance representatives who are registered with the Clerk of the Superior Court as required by *N.J. Stat. Ann* § 17:22A-16 (West 1987). *Rule* 1:13-3(e) provides that

> in the event any insurance company has failed to satisfy a judgment entered pursuant to R. 7:4-5(c)[2], or to pay a forfeiture or to file a motion to vacate the forfeiture within forty-five (45) days of the date of the notice sent pursuant to R. 3:26-6[3], the names of all of the licensed insurance producers and limited insurance representatives shall be removed from the Bail Registry until such time as the judgment or forfeiture has been satisfied. In that event, the individual licensed insurance producer or limited insurance representative who acted as bail bondsman shall also have his or her name removed from all listings in the Bail Registry until such time as the judgment or forfeiture has been satisfied.

The New Jersey Supreme Court subsequently issued a Supplemental Order to be effective in January 2001. That Supplemental Order, referred to herein as Directive #7-00, was designed to relax and supplement the provisions of the Court Rules pertaining to bail forfeiture by

---

[2] This rule pertains to bail forfeiture in the municipal courts of New Jersey, and section (c) provides that if "a forfeiture is not set aside, the court shall, on motion, enter a judgment of default, and execution may issue on the judgment".

[3] This rule pertains to bail forfeiture in the Superior Court and sets forth the process for the declaration and notice of forfeiture, the setting aside of a forfeiture, and

imposing notice requirements when a court ordered forfeiture or entered a judgment. The Directive required that a copy of a judgment entered on bail bond forfeiture be served on the corporate surety company, the licensed insurance producer and the limited insurance representative named in the judgment. The Directive also ordered that upon receipt of a judgment, the Clerk of the Superior Court of the State of New Jersey ("Clerk") serve notice that the failure to satisfy the judgment within 15 days of the notice will result in the removal of the names of all of the corporate surety's licensed insurance producers and limited insurance representatives from the bail registry until the judgment is satisfied.

The Clerk is appointed by the New Jersey Supreme Court to serve at its pleasure, and is not subject to the provisions of New Jersey's civil service statutes. *N.J. Stat. Ann* § 2B:3-1 (West 1991)

In New Jersey, the Clerk is described by the case law as a neutral and impartial judicial officer responsible to the judiciary. *State v. Ruotolo,* 247 *A.2d* 1, 4 (N.J. 1968); *State v. Prickett,* 572 *A.2d* 1166, 1169 (N.J. Super. Ct. App. Div. 1990).

It is generally contemplated that the Clerk will engage in administrative and ministerial functions. *See, Petrosino v. Public Service Coordinated Transport,* 61 *A.2d* 746, 751 (N.J. Super. Ct. App. Div. 1948). It is generally not contemplated that the Clerk will engage in independent discretionary activity pursuant to a court rule or directive which will result in substantial prejudice from which a person is afforded no right of appeal.

It has long been held that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda v. Arizona,* 384 *U.S.* 436, 491 (1966). "'Constitutional rights would be of little value if they could be * * * indirectly denied...or 'manipulated out of existence.'" *Harman v. Forssenius,* 380 *U.S.* 528, 540 (1965). As a result, the "Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections." *U.S. Term Limits, Inc. v. Thornton,* 514 *U.S.* 779, 829 (1995).

The court rule and the modifying directive in issue here are but the latest in a series of changes made by the State of New Jersey to its bail forfeiture practices in the last four years. While there is no suggestion that the primary intent of those changes was to deprive persons such as this Petitioner of the protections otherwise afforded them by the Constitution, that has been the result.

The State of New Jersey has lauded the changes to the bail forfeiture practices as achieving the important goal of streamlining previously inefficient procedures. The case law, however, recognizes that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives--or the hallmarks--of democratic government..." *I.N.S. v. Chadha,* 462 U.S. 919, 944 (1983). In this case, then, where the revisions to the court rule and the language of the administrative directive result in

deprivations of rights protected by the constitution, convenience and efficiency cannot carry the day.

In pursuing those worthy goals, "the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,'...and must be 'tailored' to serve their legitimate objectives." *Dunn v. Blumstein*, 405 *U.S.* 330, 343 (1972). "[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Attorney General of New York v. Soto-Lopez*, 476 *U.S.* 898, 909-910 (1986).

A. Due Process of Law is Required Before Preclusion.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Santosky v. Kramer*, 455 *U.S.* 745, 758 (1982). The Court has previously determined that suspension of students (*Goss v. Lopez*, 419 *U.S.* 565 (1975)); revocation of probation or parole (*Gagnon v. Scarpelli*, 411 *U.S.* 778 (1973)); revocation of driver's license (*Bell v. Burson*, 402 *U.S.* 535 (1971)); denial of social security

benefits (*Richardson v. Perales*, 402 *U.S.* 389 (1971)); termination of welfare benefits (*Goldberg v. Kelly*, 397 *U.S.* 254 (1970)); and attachment of wages (*Sniadach v. Family Finance Corp.*, 395 *U.S.* 337 (1969)) all constitute losses requiring due process. The Court has also previously determined that an individual's interest in the right to continue to serve as president of a bank and participate in the conduct of its affairs is a property right protected by the Due Process Clause, that the FDIC cannot arbitrarily interfere with the continuing employment relationship with the bank, and that the FDIC's order of suspension affected a deprivation of this property interest, entitling the individual to the protection of due process of law. *See, Federal Deposit Ins. Corp. v. Mallen*, 486 *U.S.* 230, 240 (1988).

This Petitioner respectfully suggests that the termination of its ability, and that of its various agents and representatives, to conduct business in the State is of comparable significance, and that due process is required before any such deprivation. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 *U.S.* 319, 333 (1976). "Applying this test, the Court usually has held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). No opportunity to be heard was afforded here, either before or after preclusion.

B. Preclusion as Currently Implemented Denies Due Process.

"For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' ...due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'...Rather, the phrase expresses the requirement of 'fundamental fairness,' ..." *Lassiter v. Department of Social Services of Durham County, N. C.,* 452 *U.S.* 18, 24 (1981) *reh'g den.* 453 *U.S.* 927. Despite the lack of a precise definition, for more than a century a "central meaning of procedural due process" has been that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified...It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin,* 407 *U.S.* 67, 80 (1972) *reh'g den.* 409 *U.S.* 902. Without the "guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." *Boddie v. Connecticut,* 401 *U.S.* 371, 374-375 (1971). The "touchstone" of due process is the protection of persons from arbitrary government action whether the action complained of constitutes a "denial of fundamental procedural fairness...(the procedural due process guarantee protects against 'arbitrary takings'), or in the exercise of power without any reasonable justification in the

service of a legitimate governmental objective...(the substantive due process guarantee protects against government power arbitrarily and oppressively exercised)." *County of Sacramento v. Lewis,* 523 *U.S.* 833, 845-846 (1998). To determine what process is constitutionally due, the court has balanced three factors. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Gilbert v. Homar,* 520 *U.S.* 924, 931-932 (1997).

The Petitioner respectfully suggests that the application of the *Gilbert* test calls for a pre-deprivation and a post-deprivation hearing. The first hearing held post-judgment and pre-preclusion, and the second to be timely available after preclusion as warranted by the circumstances. The Courts of the State of New Jersey have already determined that both of those hearings are required in circumstances involving less severe deprivations than those found here. Neither, however, was available to this Petitioner.

The private interest at stake in preclusion cases such as this one is significant. The Courts have "repeatedly recognized the severity of depriving someone of his or her livelihood." *Federal Deposit Ins. Corp. v. Mallen,* 486 *U.S.* 230, 243 (1988). Preclusion is effectively a suspension or revocation of a license or registration, thus constituting an action

impinging on a property right, and triggering the constitutional due process analysis.

In addition, there is considerable risk of erroneous deprivation since the facts of this matter clearly illustrate that judgments are entered in error. Even a brief review of the files of this Petitioner reveals situations in which default judgments are entered in error, duplicate judgments are entered, and judgments are entered after the forfeiture has already been satisfied by payment. The probable value of even limited procedural safeguards is significant. Requiring some affirmative demonstration by the Clerk before preclusion that preclusion is appropriate in a given case, and allowing collateral matters pending below to conclude before preclusion would likely avoid instances of clearly erroneous deprivations. It would also likely avoid cases in which individuals or entities have been precluded from writing bail for some indeterminate period of time based solely on administrative or clerical errors, for example. Affording a post-preclusion hearing as warranted would also provide significant safeguards.

Consideration of the government's interest also supports the Petitioner's claims. Since the procedures pertaining to forfeitures were recently revised to reduce the administrative burden on the counties and the State, it is respectfully suggested that the imposition of minimal notice and hearing requirements on the State is not so fiscally or administratively burdensome as to be inappropriate or unreasonable. The effect of the preclusion of an individual or entity from pursuing a livelihood is

significant. The implementation of some procedural protections is both necessary and appropriate.

> It has been said that the Constitution recognizes higher values than speed and efficiency...one might fairly say of the Bill of Rights...and the Due Process Clause... that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 *U.S.* 645, 656 (1972).

It is significant for purposes of this analysis to note that most of the corporate surety's licensed insurance producers and limited insurance representatives will have no connection to any one transaction in issue and no connection to the criminal defendant responsible for the entry of the preclusion order. Thus it appears that the rule and the directive are overbroad since they impact individuals who are not afforded notice or an opportunity to participate in a hearing, and yet are precluded from writing bail *anyway* as a result of actions in which they have no part and over which they have no control.

This Court has previously expressed concerns about litigated matters in which there were failures to "provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because...the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed

that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Richards v. Jefferson County, Ala.*, 517 *U.S.* 793, 799-800 (1996) The Court noted in *Richards* however, that "mere notice may not suffice to preserve one's right to be heard in a case such as the one before us. The general rule is that '[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger.'" *Id.* at 800, n. 5.

It is also of concern to this Petitioner that due process has been said to require a "neutral and detached judge...Before one may be deprived of a protected interest...one is entitled...to an adjudicator who is not in a situation 'which would offer a possible temptation to the average man as a judge...'" *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 *U.S.* 602, 617-618 (1993). In the instant case, the Petitioner, and its agents and representatives, were deprived of protected interests without the involvement of a neutral and detached judge, and without any readily available opportunity for a review of the decision of the Clerk.

C. Preclusion as Currently Implemented Violates the Separation of Powers.

"The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers...the Constitution prohibits one branch

from encroaching on the central prerogatives of another..." *Miller v. French*, 530 *U.S.* 327, 341-342 (2000). Similarly, the constitution of the State of New Jersey provides that the "powers of the government shall be divided among three distinct branches...No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." *New Jersey State Constitution*, Art. 3, Paragraph 1. In the instant case, the Court and the Clerk have usurped the functions of both the Legislature and the Executive Branch (Department of Insurance).

In promulgating the revisions to *Rule* 1:13-3(e), the Court impermissibly impinged on the regulation of the insurance industry in New Jersey. Statutes enacted by the Legislature that address the criteria for licensing and the revocation of licenses control the business of insurance within the State. Normally, the revocation of a license involves the oversight of the Commissioner of Insurance, notice, and a hearing. The directive and the rule do not. The New Jersey Insurance Producer Licensing Act, for example, at *N.J. Stat. Ann* § 17:22A-17 (West 1987), provides for the revocation or suspension of a license or a registration if the Commissioner of Insurance finds, after notice and an opportunity for hearing, that the person in question has violated one of the articulated standards of conduct. Only the Commissioner of Insurance is authorized to deny, revoke or suspend a license or registration.

The directive and the rule conflict with the statutory provisions regarding the regulation of

licensed insurance producers and registered limited insurance representatives. As a result, *Rule* 1:13-3(e) impermissibly encroaches on the domain of the Legislature by preempting the existing statutory requirements and precluding individuals and entities from writing bail without affording them the protections articulated in *N.J. Stat. Ann* § 17:22A-17 (West 1987).

Rule 1:13-3(e) likewise encroaches on the territory of the Executive Branch as it usurps the power and responsibilities of the Commissioner of Insurance to make determinations that are reserved by statute to the Commissioner. Before the 2000 revision to *Rule* 1:13-3, only the Legislature could legislate in the area of insurance law and modify the requirements imposed on licensed insurance producers and limited insurance representatives. In addition, before that revision, only the Commissioner of the Department of Insurance could make determinations regarding the ability of licensed insurance producers or limited insurance representative to conduct business in this State. Now, the Clerk makes those determinations without any of the procedural protections previously afforded.

D. Preclusion as Currently Implemented Violates the Petitioner's Right to Equal Protection Under the Law.

"The Equal Protection Clause commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This provision creates no substantive rights... Instead, it embodies a general rule that States

must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill,* 521 *U.S.* 793, 799 (1997).

> A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.

Ex parte Commonwealth of Virginia, 100 *U.S.* 339, 347 (1879). Central to the guarantee of equal protection

> is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'...Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare."

Romer v. Evans, 517 *U.S.* 620, 633 (1996). "[I]f the constitutional conception of 'equal protection

of the laws' means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id* at 634.

The purpose "of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 *U.S.* 562, 564 (2000). The Petitioner acknowledges that the "Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 *U.S.* 1, 10 (1992).

The Petitioner further acknowledges that, "[i]n general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification...the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker...and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational". *Id.* at 11 The Petitioner respectfully suggests, however, that the unequal treatment of this Petitioner, its agents and representatives, and others similarly situated, does not pass constitutional muster.

Insurance companies and their agents and representatives who write bail bonds have been singled out for detrimentally different treatment from among all insurers who conduct business

in the State. They alone have been selected to have their licenses to conduct business effectively revoked by an entity other than the New Jersey State Commissioner of Insurance.

In addition, the court rules pertaining to forfeiture are not interpreted or implemented in the manner of other court rules pertaining to other entities. Also, the Petitioner's contract with the State is not honored in the manner of other contracts with the State.

Further, entities such as this Petitioner have been singled out for deprivation of their right to due process, and of meaningful access to the courts, since their ability to conduct business in the State will be terminated by the Clerk, with no opportunity for a hearing, during the pendency of legal actions challenging the validity of the underlying basis for the termination.

This Petitioner, and its agents and representatives, are denied equal protection of the laws when they are stripped of their ability to pursue their livelihood in the State in which they are otherwise authorized to do business as a result of transactions with which they had no contact, about which they had no knowledge, and over which they have no influence. To oversimplify for a moment, to this Petitioner's knowledge, a judgment entered against Allstate Insurance Company on a particular policy has never resulted in the preclusion of every single Allstate agent from continuing to write insurance throughout the State until the resolution of the matter in which the judgment was entered.

As this Court has previously explained, "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life and Cas. Co. v. Crenshaw*, 486 *U.S.* 71, 83 (1988).

E. Preclusion as Currently Implemented Denies the Petitioner the Benefit of the Equitable Relief Specifically Afforded by the Court Rules, the Applicable Statute and the Case Law.

Rule 3:26 of the Rules Governing the Courts of New Jersey contains the rules pertaining to bail in this State. *Rule* 3:26-6(b) provides that the court may set aside a forfeiture if its enforcement is not required in the interests of justice. If, however, the forfeiture is not set aside, and a judgment is entered, the court may still remit the bail in whole or in part in the interests of justice. *Rule* 3:26-6(c). *Rule* 3:26-7 provides that when "the condition of the recognizance has been satisfied...the court shall exonerate the obligors...A surety may be exonerated by...a timely surrender of the defendant into custody."

Since the dual purposes of bail are to secure the release of the accused from imprisonment pending disposition of the charge and then assure his presence in court as and when lawfully required, once the defendant is in custody, the bail bond, and the forfeiture thereof, are unnecessary. To this end, *N.J. Stat. Ann* § 2A:162-8 (West 1898) provides that a court shall order a return of monies previously paid as a result of a forfeiture in its discretion.

In the underlying cases, motions were filed in the trial courts seeking determinations that the Petitioner was not required to pay the full amount of the judgment of forfeiture since the individual criminal defendants were returned to the custody of the State. The Petitioner suggests that the collateral proceedings below should be heard and determined by the Court before any of its representatives are prevented from conducting business in the State. Rules 3:26-6 and 3:26-7 provide for hearings as quickly as the Court calendars can accommodate them. In this case, to accept the Clerk's position is to accept that this Petitioner and all of its representatives will be precluded from conducting their business as a result of crowded Court calendars. Such a result directly contravenes the case law, which indicates that the rights of the litigants should not be sacrificed for the sake of expediency.

In the collateral cases below, no determination had been made at the time of the preclusion regarding the amount to ultimately be forfeited. The Clerk, however, would preclude the Petitioner, and all of its representatives and agents, from conducting business in New Jersey even while a determination of the propriety of the forfeiture of the bail bond amount is pending in the Courts below.

The position urged by the Clerk will, in this and other cases, result in duplicative tracks of litigation and post-judgment filings where none should be necessary. While willing to utilize his discretion in certain instances, the Clerk maintains that he does not have discretion to avoid the preclusion of the Petitioner from

conducting business even though actions are pending below which may, based on past experience, relieve the Petitioner from all or part of the judgments entered, thereby reducing the amount ultimately owed to the State. Such a result is unnecessary to protect the State or to foster the purposes of the applicable rules and case law. The Clerk's position results in the simultaneous filing of an appeal and the pursuit of relief below in matters that might otherwise be concluded by a single proceeding in a matter of weeks.

In addition, Directive #7-00 and *Rule* 1:13-3(e) make no provision for the correction of administrative errors prior to preclusion. They make no provision for a pending application which seeks relief from the judgment, such as an exoneration motion where the criminal defendant is in custody, or has been deported. They make no provision for settlements of the matters by and between the parties that are merely awaiting approval by the Court.

The Directive and the Rule make no provision for appeal by the Petitioner of the bail forfeiture, leaving only 15 days and zero days respectively until preclusion, rather than the span of time within which a party may appeal in the normal course and thus interfere with a surety's right to appeal from an unfavorable determination. Sureties are now being precluded from writing bail bonds in this State while motions and appeals are pending, and even when supersedeas bonds have been proffered by a surety but not yet formally accepted by the trial court.

Finally, while notice of the forfeiture may be served on the parties named on the recognizance, failure to satisfy a judgment will result in the removal from the bail registry of individuals and entities who will not receive notice or an opportunity for a hearing prior to being precluded from writing bail in this State. Also troubling is the fact that the Clerk has also interpreted the preclusion authorization to mean that if an individual agent is authorized to write bail bonds for more than one company, when he is precluded on the basis of one company's actions, he is precluded from writing for even a separate, unrelated company.

Rule 1:13-3 and Directive #7-00, as presently interpreted, do not provide the Clerk with any guidelines to assist in their application, thus affording the Clerk unfettered discretion in the absence of any meaningful opportunity for judicial review.

F. This Decision is Both Important and Recurring for Individuals and Entities Other than this Petitioner.

The Petitioner has tried several times to obtain a hearing on the merits of this matter. The Petitioner's efforts have been unavailing.

It is noted that an attempt was made to have *Rule* 1:13-3 reviewed prior to the implementation of the new section (e) in *Capital Bonding v. New Jersey Supreme Court,* 127 *F. Supp.2d* 582, 584 (D.N.J. 2001). The *Capital Bonding* Court expressly abstained from reaching the merits of the case. In doing so, the Court in *Capital Bonding* indicated that, in its judgment, timely and adequate state court

review of the relevant issues was available and that, at the time, the matter was not yet ripe for review as the harm asserted was speculative. *Capital Bonding v. New Jersey Supreme Court,* 127 *F. Supp.2d* at 593-594, 595 and 598.

The harm asserted is no longer speculative, and the 'timely and adequate state court review' had proved illusory. No State court will hear these matters.

Unfortunately, this case involves a legal issue that will likely arise again and again, presenting a question of general public importance that has not yet been properly addressed but that is appropriate for a definitive resolution. In view of the impact that this decision will undoubtedly have throughout the State, the Petitioner respectfully requests that this Court consider this matter in the interests of justice.

The rule and the directive, as drafted, provide no forum to address issues raised pursuant thereto. The New Jersey Superior Court, Appellate Division, seemed to suggest that the matters really require action at the Trial Court level (App. *infra*, 4a). Respectfully, this is not so. The Petitioner is not challenging the actions of the Trial Court, but the actions of the Clerk of the Superior Court. The Petitioner does not urge this Court, or any other, to consider "the particular facts in each of the disputed default judgment matters" (App., *infra*, 4a) but rather to assess whether or not the actions of the Clerk are constitutionally deficient.

Although it is a private business entity, the Petitioner plays a significant role in New Jersey's criminal justice system. The issuance

of bail bonds represents not only a business for the Petitioner, but an opportunity for numerous individuals throughout the State to avoid incarceration before any determination of guilt.

At present, the language of the rule and the directive leave room for misinterpretation, and a deprivation of constitutionally protected rights. This is particularly true in light of the absence of guidance from the New Jersey courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Samuel M. Silver, Esq.
511 Milltown Road, Building 1
North Brunswick, New Jersey 08902
732-937-8332
Counsel for Petitioner

Laura C. Tharney, Esq.
555 Route 18 South, PMB 219
East Brunswick, New Jersey 08816
732-448-9300
Of Counsel

April 2002

APPENDIX A

ORDER ON EMERGENT APPLICATION

IN RE PRECLUSION OF HIGHLANDS INSURANCE COMPANY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
PART: P
JUDGE(S): CONLEY
CUFF

EMERGENT APPLICATION
FILED: JULY 13, 2001 BY: Applicant

ANSWER(S) FILED: July 13, 2001 BY: Respondent

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 16TH DAY OF JULY 2001, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
EMERGENT APPLICATION FOR A STAY, OR IN THE ALTERNATIVE TO FILE A BOND	( )	(X)	(X)

SUPPLEMENTAL:
The motion for stay, or in the alternative to file a bond, is denied. The denial is without prejudice to any similar application Highlands Insurance Company might file in each of the underlying matters in which Highlands has or will file motions to vacate.

The entertainment of Highlands' motion for stay should not be viewed as acceptance of Highlands' contention that our original jurisdiction should be properly exercised to encompass a controversy primarily generated by the various underlying disputed default judgments. We have entertained the motion for emergent relief without prejudice to the State's moving to dismiss the appeal.

FOR THE COURT:

/s/ Erminie L. Conley, J.A.D.
ERMINIE L. CONLEY, J.A.D.

APPENDIX B

ORDER ON EMERGENT APPLICATION

IN RE PRECLUSION OF HIGHLANDS INSURANCE COMPANY (State v. Sharif Wilson, State v. Shawn Sheffield, State v. Marcus Denver, State v. Anthony Butler, State v. Stephen Kpeyue)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
PART: P
JUDGE(S): CONLEY
CUFF

EMERGENT APPLICATION
FILED: JULY 17, 2001 BY: Applicant

ANSWER(S) FILED: BY:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 19TH DAY OF JULY 2001, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
EMERGENT APPLICATION FOR A STAY	( )	(X)	(X)

SUPPLEMENTAL:
The separate applications for stay should be filed before the Law Division judges in each of the underlying disputed default judgment matters. If Highlands is successful in obtaining a stay of a

particular default judgment, it may apply to the Superior Court Clerk for a reconsideration of the July 13, 2001, removal.

Because review of the Clerk's determination requires consideration of the particular facts in each of the disputed default judgment matters, review thereof by this court at this stage is premature. On our own motion, therefore, we dismiss this appeal as premature.

FOR THE COURT:

/s/ Erminie L. Conley, J.A.D.
ERMINIE L. CONLEY, J.A.D.

APPENDIX C

ORDER ON MOTION

IN RE PRECLUSION OF HIGHLANDS INSURANCE COMPANY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005980-00T1
MOTION NO. M-006583-00
PART: P
JUDGE(S): CONLEY
CUFF

MOTION FILED: JULY 17, 2001
BY: HIGHLANDS INSURANCE CO

ANSWER(S) FILED: BY:

SUBMITTED TO COURT: AUGUST 20, 2001

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 7TH DAY OF SEPTEMBER 2001, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
FOR RECONSIDERATION TO VACATE THE DISMISSAL AND REINSTATE THE APPEAL	( )	(XX)	( )

SUPPLEMENTAL:

FOR THE COURT:

/s/ Erminie L. Conley, J.A.D.
ERMINIE L. CONLEY, J.A.D.

APPENDIX D

SUPREME COURT OF NEW JERSEY
C-478 September Term 2001
52,076

IN RE PRECLUSION OF
HIGHLANDS INSURANCE COMPANY,

ON PETITION FOR CERTIFICATION

(HIGHLANDS INSURANCE COMPANY - Petitioner

FILED 1/10/2002

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5980-00 having been submitted to this Court, and the Court having considered same;

It is ORDERED that the petition for certification is denied, with costs.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 8th day of January 2002.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT